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IN THE

Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS – N. PROVIDENCE, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, and UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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REPLY BRIEF

I. Rhode Island defends its statutory scheme by asserting a power to ban chain stores and franchises without justification.

Rhode Island's defense of its chain store ban is premised on the bizarre assertion that chain stores and franchised businesses are the legal equivalent of collusion between competitors. "The decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) makes it clear that the State can, and must, prohibit the 'business plan' touted by Petitioners." *Brief in Opposition*, p. 13. The State relies on *Giboney* for the unassailable proposition "'that states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade.'" *Id.*, *quoting* 336 U.S. at 495. *See also Id.* at p. 4 (describing the Douglas stores as an "anti-consumer chain store"). The State's view of chain stores and franchises as illegal anti-competitive forces in the marketplace establishes the crux of the present dispute. The Petitioners assert that national and regional retailers are entities competing in a free market against other retailers. Rhode Island, and

others, consider the very existence of such stores to violate of anti-trust principles because local retailers must compete with the greater marketplace efficiencies available to chains and franchises. The State ignores the fundamental difference between a successful family business that grows into multiple stores versus competing stores that collectively dominate a market and agree not to compete with each other. The State's failure to recognize this distinction explains why the State cites to successful practices of chains and franchises as evidence of wrongdoing. *See Brief in Opposition*, p. 7 ("Employees at all stores dress in an identical fashion, all wearing the 'Douglas' logo, without any store designation. (C.A. App. 107). Stores also provide shopping carts emblazoned with the Douglas logo, with no differentiation as to the individual store. (C.A. App. 107)").

By citing to *Giboney*, Rhode Island equates the expansion of a successful small business into a multi-store enterprise with an illegal effort to exclude competitors from the marketplace. This encapsulates the question presented here: Are chain stores and franchises *per se* equivalent to acts of collusion between competitors and therefore violative of antitrust law? Or, as stated by Rhode Island: "Whether a State may structure its retail liquor distribution system to outlaw chain stores and franchises?" *Brief in Opposition*, p. i.[1]

Such a dramatic expansion of the definition of illegal anti-competitive behavior, as proffered by Rhode Island and endorsed by the First Circuit, would permit states to go far beyond combating the forms of behavior traditionally subject to restriction.

> Arguments and combinations not to sell to or buy goods from particular persons, or to dictate the

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[1] It must reiterated that the police power asserted by Rhode Island and endorsed by the First Circuit was not limited to the retail liquor market, but is based on deference to the State's power to enact "economic legislation." App. 25.

> terms under which transportation will be supplied, are well recognized trade restraint practices which both state and national legislation can and do prohibit.

Giboney, 336 U.S. at 495. Such an expansion would empower states and municipalities to do as Rhode Island has done here and ban [national and regional retailers / chains and franchises] from their markets.

II. Rhode Island acknowledged below that promoting temperance is not a justification for banning chains and franchises.

In its *Brief in Opposition*, Rhode Island raises temperance as a justification for banning chain stores and franchises, but fails to disclose that it had disavowed temperance as a reason for the law during discovery. In responding to an interrogatory asking "If you contend that either §3-5-11, 3-5-11 (as amended) or 3-5-11.1 reduce the consumption of alcoholic beverages, state the basis for that contention", Rhode Island responded: "For purposes of this litigation, no." C.A. App. 298.

Rhode Island's effort to justify its restrictions on commerce and speech implicitly acknowledges its need to supply some valid justification beyond mere local protectionism for its restrictions. But justifications based on the Twenty-first Amendment are fact intensive and require careful scrutiny of the competing concerns. *See, e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Had the State offered temperance as a justification, Rhode Island would have been required to establish how the challenged provisions impact abusive consumption. No evidence or arguments about consumption were presented in either the courts below or in Rhode Island's *Brief in Opposition*.

Simply invoking the Twenty-first Amendment is not enough to save a statute from constitutional review.

> [T]he Court has held that state laws that violate other provisions of the Constitution are not saved

> by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996); the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982); the Equal Protection Clause, *Craig*[v. *Boren*, 429 U. S. 190,] 204–209; the Due Process Clause, *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971); and the Import-Export Clause, *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964).

Granholm v. *Heald*, 544 U.S. 460, 486-87 (2005). *See also, 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 350 (1986) (rejecting New York's "unsubstantiated interest in protecting small retailers"). *Granholm* established that the States' "virtually complete control over how to structure the liquor distribution system" means that while the states are free to exclude alcoholic beverages altogether or undertake distribution themselves, once the State creates a private enterprise system of distribution it must regulate in accordance with the Commerce Clause. *Granholm*, 544 U.S. at 487-489.

III. This matter raises issues of national importance

Rhode Island, by asking the Court to "give no consideration" to Part II of the Reasons for Granting the Writ section of the *Petition*; stating that it "contains material and argument never submitted to either the District Court or Circuit courts" (*Brief in Opposition*, p. 10), betrays a misunderstanding of the criteria for issuing a writ of certiorari. Part II of the Reasons for Granting the Writ does not address the constitutionality of Rhode Island's statutory scheme; rather it explains the national import of the issues presented in the *Petition* through a survey of similar anti-national and regional retailer legislation from around the nation. This discussion of the national context of the impact of the First Circuit's decision was not presented to the courts below, but such a

discussion should not have been a relevant factor in the analysis by those Courts.[2]

IV. Standing was not an issue with respect to the claims presented in the *Petition*.

A. Commerce Clause claims

Rhode Island attempts to shoehorn Petitioner's entire dormant Commerce Clause argument into one theory that was presented below and rejected by the First Circuit for lack of standing. But Rhode Island overstates the First Circuit's holding. *Brief in Opposition*, p. 8 ("Quite significant are the rulings by the trial and Appellate courts that Petitioners lack standing to press the Commerce Clause claims they now seek to have this Court consider" (emphasis added)). The First Circuit held that the Petitioners lack standing to bring one theory under the Commerce Clause – the challenge to the residency requirement of §3-5-10.

Rhode Island's statutory scheme erects two absolute barriers to interstate commerce. First, §3-5-10 bars out of state entities from entering the Rhode Island market. Second, §3-5-11 (a) bars anyone with who does business in other states from also doing business in Rhode Island. While it is true that, as found by the First Circuit, the Petitioners, as Rhode Islanders, are not barred by §3-5-10's residency requirement; it is also true that the Petitioners are barred from the Rhode Island market by operation of §3-5-11 (a) because of the continued

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[2] To the extent any question exists as to whether the theories raised in the *Petition* were sufficiently raised below, the Petitioners notes that during the two day trial in this matter, both sides presented evidence and arguments concerning the dormant Commerce Clause claims. Further, parties are only required to adequately raise claims below, not specific arguments. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (Noting the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'", *quoting Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992)).

operation of the original Massachusetts Douglas Wine & Spirits stores.

The only theory for which the First Circuit found standing wanting was this one portion of the barrier to interstate trade argument related to §3-5-10's residency requirement. The First Circuit found sufficient standing to address Petitioners' Commerce Clause challenges to §§3-5-11 and 3-5-11.1. App. 18-25 ("The injuries of which the plaintiffs complain arise in consequence of Rhode Island's ban on franchise and chain-store arrangements, not in consequence of the residency requirements per se"). Petitioners have clear standing to challenge these provisions because they were not permitted to expand their existing Massachusetts operation into Rhode Island, because of §3-5-11's ban on chain stores. App. 86. The franchise model adopted by Petitioners as a way to comply with §3-5-11 has now been banned by §§3-5-11 (b) and 3-5-11.1. App. 86-87. Petitioners cannot do business in Rhode Island's retail liquor market unless they shed all interest in their out-of-state businesses. *See* §3-5-11(a) at App. 86.[3]

B. First Amendment claims

The Petitioners are banned from using their established trade name and from running joint ads. Any suggestion that they lack standing to challenge these restrictions on their speech is specious. Between the various Petitioners, they draft the contents of the ads, design the graphics for the ads, place the ads, and pay for the ads. Their speech is directly limited by the restrictions of §3-5-11(b)(1)(iii). App. 86. The Petitioners have been ordered to cease using the trade name by which they have identified themselves to their costumers for years. *See*

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[3] Indeed, the Petitioners can have no interest in any wholesale or retail businesses, whether related to alcoholic beverages or not.

§3-5-11(b)(1)(vi).[4]

Characterizing Petitioners' advertisements as conduct rather than speech directly conflicts with a recent decision of the Fifth Circuit, in which that Court did viewed a Texas ban on joint marketing by insurance companies and repair shops as a restriction on speech rather than a ban on conduct. *Allstate Insurance Company* v. *Abbott*, 2007 WL 2192895, *9 (5th Cir., decided August 1, 2007) (finding the joint marketing ban unconstitutional under the First Amendment).

V. A recent decision of the Fifth Circuit creates additional conflicts between that Circuit and the First Circuit

Rhode Island argues that conflicting decisions from other Circuits do not "involve[] action[s] by the State to regulate[] anticompetitive, collusive conduct as is present

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[4] Rhode Island incorrectly states:

> Petitioners mischaracterize the above list [of activates specified in §3-5-11(b)(1)] as establishing absolute prohibitions against the cited activity. A simple reading of the statute makes clear that is not correct - subsections (1)(a)-(f) simply provide indicia of chain store ownership that the State may consider when determining whether stores have violated the law.

Brief in Opposition, p. 2.

> Section 3-5-11 states:
>
> (a) Licenses . . . shall not be granted, issued, or transferred to or for the use of any 'chain store organization,' . . . (b) The term 'chain store organization' is defined to include, but not limited to: (1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices . . .

App. 86 (emphasis added). The Rhode Island Department of Business Regulation has also stated that the use of "similar names" standing alone constitutes a violation of §3-5-11. App. 76 (DBR Bulletin stating that "pursuant to the prohibitions set forth in R.I.G.L. §§3-5-11 and 11.1, the following practices are hereby prohibited . . . participation in coordinated or common advertising . . . existence of Class A licensees with the same or materially similar names" (emphasis added)).

here." *Brief in Opposition*, p. 29.[5] Rhode Island fails to note the recent decision by the Fifth Circuit addressing exactly that scenario and reaching the opposition conclusion than that reached by the First Circuit in the present matter.

On August 1, 2007, the Court of Appeals for the Fifth Circuit addressed dormant Commerce Clause and First Amendment challenges to a Texas statute that bared insurance companies from owning auto repair shops. *Allstate Insurance, supra*. Although the Fifth Circuit permitted Texas to regulate the economic relationship between insurance companies and repair shops, that court did not permit the restriction of their joint advertising and use of their trade name in the name of preventing "anticompetitive" associations.

The challenged Texas statute prohibited joint marketing programs by insurance companies and repair facilities. It also restricted the way in which repair facilities tied to insurance companies may use the insurer's name in their marketing. *Allstate Insurance*, 2007 WL 2192895, *9. The speech restrictions at issue in *Allstate Insurance* and in the present matter are strikingly similar: "Tex. Occ. Code §2306.006(3)[6] [] prohibits an insurer from engaging in a joint marketing program with a tied repair facility" *Allstate Insurance*, *9; RI Gen. L. §3-5-11 (b)(1)(iii) prohibits "[p]articipation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media" App. 86; "Tex. Occ. Code §2306.006(6) [] prohibits allowing a tied repair facility to use an insurer's name in a manner different from that allowed for any other facility with which the insurer has a referral arrangement" *Allstate Insurance*, *9; RI Gen. L. §3-5-11 (b)(1)(vi) prohibits "[a]ny

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[5] Again, Rhode Island basis its argument on the unproven assumption that chain stores and franchises constitute illegitimate "collusive conduct."

[6] Section 2306.006 was subsequently renumbered as §2307.006.

term or name identified as a chain or common entity" App. 86.

Although both Rhode Island and Texas justified their restrictions on joint advertising and use of trade names as necessary to prevent "anticompetitive" behavior, the Fifth Circuit, unlike the First, required the State to justify those restrictions under First Amendment scrutiny. In the present matter, the First Circuit held that Rhode Island's ban on "coordinated or common advertisement" was not subject to First Amendment review because joint advertising constituted conduct, not speech. App. 8 ("The statute at issue here merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial strategies. Such a ban is not a ban on commercial speech").

Both Texas and Rhode Island argued that because the underlying business relationships have been prohibited, the speech targeted by their statutes constitutes illegal speech and is not protected under the first prong of *Central Hudson*. App. 13; *Allstate Insurance*, *9. While the First Circuit agreed with this argument with regard to the use of shared trade names (App. 11-14), the Fifth Circuit did not. The Fifth Circuit correctly held that commercial speech only falls outside of the protections of the First Amendment where the speaker "advertis[es] a product it was strictly prohibited by law from selling." *Allstate Insurance*, *9. Whether it is recommending a repair facility or selling alcoholic beverages, under the standard applied by the Fifth Circuit, commercial speech would not be excluded from constitutional protections if the commercial activity being advertised is legal and the advertisement is truthful.

Having found the commercial speech to be protected by the First Amendment, the Fifth Circuit then noted the failure of Texas to establish that its objectives could not

be achieved less restrictive means, such as the inclusion of clarifying language. *Allstate Insurance*, *11.[7]

VI. Rhode Island's recital of Equal protection Clause cases is not relevant to this *Petition*.

Pages 25 through 29 of the *Brief in Opposition* review a series of Equal Protection Clause cases related to liquor regulation. While the Petitioners did include an Equal Protection Clause/rational basis claim below, they have not pursued that theory in the *petition*. Therefore, Rhode Island's discussion of cases that have addressed rational basis challenges to liquor regulations has little relevance here.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[7] In another case decided following the filing of the Petition, the U.S. District Court for the Northern District of New York held that New York's prohibition on attorneys using trade names that imply an ability to obtain results is unconstitutional under the *Central Hudson* analysis because the State failed to show that a disclaimer would be ineffective at preventing deception. *Alexander* v. *Cahill*, 2007 WL 2120024, *8 (N.D.N.Y, decided July 23, 2007).